Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
Inmarsat Group Holdings Ltd.	)	IB Docket No. 04-439
Certification and Petition for Declaratory Ruling Pursuant to Section 621(5)(F) of the ORBIT Act	)	

REPLY TO OPPOSITION

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TABLE OF CONTENTS

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Inmarsat Group Holdings Ltd. ("Inmarsat") hereby files this Reply to the Opposition of Mobile Satellite Ventures ("MSV") and to the supporting comments of Lockheed Martin Corporation ("Lockheed") in the above-captioned proceeding (the "Opposition").

I. INTRODUCTION AND SUMMARY

The underlying facts at issue here are set forth in Inmarsat's November 15, 2004 Petition for Declaratory Ruling, as supplemented by a letter dated December 16, 2004 (collectively, the "Petition"). Over three years ago, the Commission determined that Inmarsat has met all of the requirements of the ORBIT Act, except for the requirement to conduct an IPO.[1] Since then, the ORBIT Act has been amended to obviate the need for an IPO if the

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[1] The Commission determined that (i) "Inmarsat's privatization is consistent with the non-IPO criteria specified in Sections 621 and 624 of the Open-Market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act"), Pub. L. 106-180, §§ 621 and 624" and (ii) conditioned the grant of authority on "a future Commission finding that Inmarsat has conducted an IPO under Sections 621(2) and 621(5)(A)(ii) of the ORBIT Act." *In the Matter of Comsat Corporation d/b/a Comsat Mobile Communications, et al.*, Memorandum Opinion, Order and Authorization, 16 FCC Rcd 21,661 ¶¶ 109 -110 (2001) ("Market Access Order").

conditions in Section 621(5)(F)(i) are satisfied instead: (i) Inmarsat achieves substantial dilution of the aggregate amount of signatory and former signatory financial interest in Inmarsat, (ii) no intergovernmental organization has more than a minimal ownership interest in Inmarsat, and (iii) any signatories or former signatories that retain a financial interest in Inmarsat do not possess, together or individually, effective control of Inmarsat.[2] In its Petition, Inmarsat certified that it has met these three conditions, and sought a declaratory ruling to that effect.

In response to Inmarsat's Petition, MSV filed its Opposition and Lockheed has filed in support. There is no dispute over the prior Commission finding that Inmarsat has satisfied the non-IPO requirements of the Orbit Act. Nor is there any dispute that Inmarsat has satisfied two of the three prongs of Section 621(5)(F)(i): (i) that Inmarsat has achieved "substantial dilution" of the aggregate amount of signatory and former signatory financial interest in Inmarsat, and (ii) that no intergovernmental organization holds more than a minimal ownership interest in Inmarsat. The only issue raised by MSV is whether any signatories or former signatories that retain a financial interest in Inmarsat possess, together or individually, effective control of Inmarsat.

MSV's basic claim is that over a dozen separate companies who, in the aggregate (but not collectively), hold 42.54% of Inmarsat's equity, control Inmarsat even though: (i) investment funds advised by two private equity firms, Apax Partners and Permira, have orchestrated a takeover of Inmarsat and thereby have acquired a clear majority of Inmarsat's voting interests, (ii) even though the Apax Partners funds and the Permira funds control the

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[2] As used herein, "signatories" has the same definition as that set forth in Section 681(a)(3) of the ORBIT Act.

appointment and removal of six of the eight[3] members of Inmarsat's Board of Directors and of Inmarsat's officers, and (iii) even though those firms control a wide host of Inmarsat's corporate and operational policies and decisions.[4]

MSV is simply mistaken. As an initial matter, its Opposition is riddled with material misstatements of fact.[5] Perhaps more importantly, the Opposition misconceives the

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[3] Inmarsat's Board of Directors was recently increased from seven to eight with the appointment of an additional independent director.

[4] As Inmarsat previously has certified to the Commission, none of the former signatories holds any direct or indirect ownership interests in the Apax Partners funds or the Permira funds. *See* Petition at 4, n.9 and 7, n.22.

[5] For example:

While MSV describes the former signatories as "responsible for a majority of Inmarsat's equity," the former signatories actually hold less than 43% of Inmarsat's equity. *See* MSV Opposition at 13; Petition at Attachment B.

While MSV alleges that Stratos Wireless, Inc., which accounted for 27.3% of Inmarsat's revenues for the nine-month period ended September 30, 2004, is one of the entities that holds "significant voting interests in Inmarsat," Stratos' equity (and voting) interest in Inmarsat consists of a single (1) share, representing 0.0000037% of Inmarsat's outstanding equity. *See* MSV Opposition at 10; Petition at Attachment B.

MSV incorrectly asserts that either the Telenor or the Comsat appointed director, each of whom has a board seat by virtue of Telenor's and Comsat's greater than 10% equity stake in Inmarsat, can block an Inmarsat board meeting by failing to show up at the meeting. *See* MSV Opposition at 13. MSV ignores the relevant clause in Inmarsat's Articles of Association which provides that, if the Telenor or the Comsat director fails to show up for such a board meeting, the meeting can be re-adjourned seven days later and that merely the two directors appointed by the Apax Partners funds and the Permira funds can constitute a quorum for the re-adjourned meeting. *See* MSV Opposition at 13; Inmarsat Group Holdings Articles of Association (the "Articles of Association"), attached as Exhibit F to the Petition, at § 39.8.

MSV's claim that Inmarsat has not disclosed the extent to which "former signatories hold direct or indirect interests in the two private equity funds investing in Inmarsat" is belied by Inmarsat's express certification that: "No former signatory of Inmarsat is an investor in the funds advised by Apax Partners or the funds advised by Permira that own shares in Inmarsat Group Holdings." *See* MSV Opposition at 9, n.16; Petition at 7, n.22.

relevant law. As amended, ORBIT requires, if Inmarsat does not conduct an equity IPO, that Inmarsat's former signatories do "not possess effective control" over Inmarsat. This "control" determination is in turn guided by the Commission's well-developed case law as to what constitutes *de jure* or *de facto* control.

The relevant case law leaves no doubt that the former signatories do not possess effective control. Even if all of the former signatories were to join together in a single block – and there is no evidence that they would – still they would lack effective control. In the aggregate they hold a minority of the votes. Each of Telenor and Comsat Investments, Inc. (as a 10% or greater shareholder) is entitled to elect one of the eight Inmarsat directors, but neither they nor any other former owner of Inmarsat has the ability to control the election of the other six directors. To the contrary, that is the exclusive province of the Apax Partners funds and the Permira funds, or their respective appointed directors. Pursuant to the Shareholders Agreement to which all equity holders in Inmarsat are bound, no Inmarsat director (save for the Comsat director and the Telenor director), and no Inmarsat officer, may be appointed without consent of both the Apax Partners funds and the Permira funds, or their respective appointed directors. Moreover, the Inmarsat Shareholders Agreement[6] similarly reserves to the Apax Partners funds and the Permira funds a host of specific enumerated powers over the operation of the business of Inmarsat. And the limited veto rights the former owners of Inmarsat retain are the customary types of minority investor protections that come nowhere near the level of "dominance" that constitutes *de facto* control.

Lockheed is correct that the interests of Comsat Investments, Inc., a stockholder in Inmarsat, should not be equated with the continuing interests of former signatories. Comsat

[6] Attached as Exhibit E to the Petition (the "Shareholders Agreement").

Investments is a different legal entity, with different ownership, and it no longer engages in the same lines of business as the entity which previously was an Inmarsat signatory.[7] In any event, the funds advised by Apax Partners and the funds advised by Permira have control of Inmarsat.

MSV's Opposition lacks basis in both law and in fact. As such, the Commission should act swiftly to dismiss the Opposition, and should grant Inmarsat's Petition on the basis of the existing record and without further delay.[8]

II. THE ORBIT ACT AMENDMENT

As an initial matter, MSV is wrong when it claims that ORBIT requires a "full separation" of Inmarsat from the former signatories and that ORBIT disallows any "material financial interest" by the signatories in Inmarsat.[9] By its plain terms, ORBIT permits the former signatories to retain significant interests in Inmarsat – including financial, commercial and corporate ties -- so long as the former signatories retain neither a "majority of the financial interests," nor "effective control" over the company.[10]

When Congress amended ORBIT in 2004, it sought to recognize "what is happening today in the real world."[11] Congress understood that the public financial markets for years had demonstrated little appetite for initial equity offerings by satellite companies, and

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7 Comments of Lockheed Martin Corporation at 3 (filed Jan. 21, 2005) (stating that Comsat now operates under different ownership); FCC Report to Congress as Required by the ORBIT Act, FCC 04-132 at 7 (rel. June 15, 2004) (describing acquisition by Intelsat and Telenor of Comsat's operating business) ("Fifth Report").

8 Swift action by the Commission is particularly important, as Inmarsat will launch two next-generation Broadband Global Area Network ("BGAN") satellites over the next six months, and its distributors therefore soon will be filing applications to provide US service.

9 MSV Opposition at 4.

10 ORBIT Act at §§ 621(5)(F)(i)(I), 621(5)(F)(i)(II).

11 150 CONG. REC. H9025, H9026 (statement of Rep. Barton).

therefore determined that Inmarsat and INTELSAT alternatively could use "private equity deals" to accomplish the "substantial dilution" of former signatory interests that the IPO requirement was intended to produce.[12] Congress thus provided a three-pronged alternative to the IPO requirement in Sections 621(2) and 621(5)(A)(ii) of the ORBIT Act. Inmarsat may "forgo an initial public offering" if:

- it achieves "substantial dilution" of the aggregate "financial interest" of signatories and former signatories;"
- "any signatories . . . that retain a financial interest" in Inmarsat do not possess "effective control" of the company; and
- "no intergovernmental organization has . . . more than a minimal ownership interest in [Inmarsat]."[13]

This "substantial dilution" requirement is clearly defined, requiring that "a majority of the financial interests in [Inmarsat] is no longer held or controlled . . . by signatories or former signatories." The intergovernmental organization "minimal ownership" requirement is equally straightforward. As set forth above, there is no dispute by MSV that those two prongs have been fully satisfied.

The "effective control" requirement is similarly straightforward, and requires that the Commission look to its well-developed interpretations of "control" under Section 310(d) of the Communications Act, and elsewhere.[14] Notably, ORBIT requires only that the signatories lack control; it does not require another party obtain affirmative control. Indeed, satisfying the initial IPO requirement would have required considerably less: the number of shares offered in

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[12] *Id.*

[13] ORBIT Act at § 621(5)(F)(i).

[14] *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well").

an IPO "has historically averaged between 15% and 25% of the company's total shares."[15] As Lockheed rightly points out, this is consistent with the level of public ownership that has been achieved in the IPOs of satellite companies.[16] Moreover, in an IPO, the securities that are offered to the public typically become widely dispersed, so that no person or entity within the new ownership group holds more than a small percentage of the company. Thus, if Inmarsat had conducted an equity IPO, former signatories certainly would have retained a majority of Inmarsat's equity, and they would have retained by far the largest blocks of stock, giving each former signatory far greater power than the diffuse holdings of the "public" owners.

Against this backdrop, and according to its plain terms, the "effective control" requirement must be seen not as a requirement that a majority voting interest pass to a single non-signatory holder, and not as a requirement that some other party come into affirmative control. Rather, the "effective control" requirement must be read only for what it is: a requirement that the former signatories themselves no longer retain affirmative control over the enterprise.

III. "EFFECTIVE CONTROL" HAS PASSED AWAY FROM THE FORMER SIGNATORIES

MSV claims in its opposition that the former signatories possess "effective control" of Inmarsat, such that the requirements of the Section 621(5)(2)(F) are not met.[17] This claim wholly ignores the facts set forth in Inmarsat's Petition, and the express terms of Inmarsat's Articles of Association and Shareholders Agreement that are appended to that submission.

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[15] Ira A. Greenstein *et al.*, *An Insider's Guide to Going Public*, 20 (2000).

[16] *See* Comments of Lockheed Martin Corporation in IB Dkt. No. 04-439 (filed Jan. 21, 2005). *See also, e.g.*, *XM Satellite Radio Holdings Inc.* Form S-1, Amendment No. 7, available at http://www.sec.gov/Archives/edgar/data/1091530/0000928385-99-002985-index.html (filed Oct. 4, 1999) (offering 22.8% of its common stock).

[17] Opposition at 1.

A. Under MSV's "Block" Theory, Apax and Permira Have *De Jure* Control Over Inmarsat

The cornerstone of MSV's claims is its assertion that the more than a dozen separate former signatories that retain financial interests in Inmarsat must be viewed as a cohesive block for purposes of the "effective control" analysis. However, there is no evidence whatsoever that the former signatories are parties to a voting agreement or otherwise have agreed act as a block, nor is there any evidence that they do in fact act as a block. Commission precedent is very clear that "it is not appropriate to infer, in the absence of information to the contrary, that [a party] will be . . . controlled and operated in a manner that differs" from the documents defining its corporate governance.[18]

Moreover, contrary to MSV's assertions,[19] nothing in ORBIT requires the Commission to treat the former signatories as a block. The language in Section 621(5) of ORBIT requiring a determination as to whether former signatories possess such control "together or individually" cannot be read to force counter-factual assumptions on the Commission. Rather, the inquiry as to whether a block of shareholders "together" possesses control can only be interpreted to inquire into whether there is in fact a voting or similar agreement that effectively combines their respective voting power, or whether they in fact act as a controlling block. No such agreement exists here in the case of the former signatories.

More fundamentally, MSV's logic – that interest holders with similar interests must be treated as a cohesive block for purposes of the control analysis – would require the Commission to treat the Apax Partners funds and the Permira funds as a single block. The Apax Partners funds and the Permira funds are, after all, far more alike, and more cohesive in their interests, than are any two of the former signatories, let alone all of the former signatories. The

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[18] *See In re: News International, PLC*, Memorandum Opinion and Order, 97 FCC 2d 349 ¶ 17 (1984) ("News International Order").

[19] Opposition at 11 n.22.

Apax Partners funds and the Permira funds are large private equity funds that acted together to take over Inmarsat, and that acquired their ownership stakes at exactly the same time. Their collective holdings are identical in size, and the corporate governance rights afforded to each are identical. This is no accident – it reflects their express intention to be able to control Inmarsat to the exclusion of the former signatories who retain a continuing interest.

Under MSV's own "block" control analysis, then, the holdings of the Apax Partners funds and the Permira funds constitute *de jure* control over Inmarsat, with 51.87 percent of Inmarsat's voting equity, and the power to appoint six of Inmarsat's eight directors.[20]

B. Each of Apax and Permira Has *De Facto* Control Over Inmarsat

Even if the interests of the Apax Partners funds and the Permira funds were not viewed as a block – and thus could not be said to possess *de jure* control over Inmarsat – each of Apax and Permira holds *de facto* control over Inmarsat. The Commission has stated that a shareholder in a corporation may exert *de facto* control over that corporation if it "has the power to 'dominate' the management of corporate affairs."[21] The circumstances that lead the Commission to find such "dominance" may vary according to the situation, but an essential element typically includes the power to "direct the company's operations."[22] That is the case here with the Apax Partners funds and the Permira funds.

1. Voting rights

The Apax Partners funds and the Permira funds control Inmarsat through their respective voting rights: each holds 25.87 percent. The next largest shareholders are Telenor and Comsat, with 14.95 and 13.96 percent respectively. Beyond them, shareholdings are dispersed

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[20] *See, e.g., In re Application of Baker Creek Communications, L.P.*, Memorandum Opinion and Order, 13 FCC Rcd 18,709 ¶ 6 (1998) (holding "50.1 percent or more" constitutes "*de jure* control" under FCC analysis) ("Baker Creek Order").

[21] Baker Creek Order ¶ 29.

[22] *In the Matter of Sprint Corporation*, Declaratory Ruling and Order, 11 FCC Rcd 1,850 ¶ 20 (1996) ("Sprint Order").

among over a dozen additional shareholders, including various current and former employees and directors of Inmarsat. The Apax Partners funds and the Permira funds each hold a plurality of the voting equity, then. Solely by virtue of their voting rights, the Apax Partners funds and the Permira funds have negative control over Inmarsat, for there is no way to assemble a majority of votes without including at least one of them.

2. Board of Directors and Officers

The Apax Partners funds and the Permira funds have the power to control the overall composition of the Inmarsat Board of Directors. The board currently has eight members. Six of those directors may not be appointed, nor may they be removed, without the consent of both the Apax Partners funds and the Permira funds.[23] Moreover, the Apax Partners funds and the Permira funds can by mutual consent expand the Board infinitely, and together they retain an absolute power of consent over any appointment to that expanded board.[24] Furthermore, each has the right to approve the appointment of any Inmarsat officer.[25] Indeed, without their consent, the recent changes in Inmarsat's Chief Executive Officer, Chief Financial Officer, and General Counsel would not have occurred. Because each of the Apax Partners funds and the Permira funds has veto power over the appointment or removal of an absolute majority of the members of the Board, and over each officer of Inmarsat, each has negative control over Inmarsat.

3. Veto rights

The Apax Partners funds and the Permira funds also possess negative control through their right to approve virtually any act of significance by Inmarsat. Under the Shareholders Agreement, each of the Apax Partners funds and the Permira funds (or their respective appointed directors) has veto rights over a broad range of corporate actions regarding

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[23] Shareholders Agreement at Schedule 6, Item 11.

[24] Articles of Association §§ 32, 37.5.

[25] Shareholders Agreement at Schedule 6, Item 11.

Inmarsat's business. MSV's characterization of these rights as "minority protections"[26] is a misnomer because the Apax Partners funds and the Permira funds hold a majority, not a minority, of the shares. And substantively, this characterization belies the breadth and scale of those veto rights.

a. *The breadth of the Apax Partners and Permira veto rights*

The veto rights that the Apax Partners funds and the Permira funds hold far exceed typical investor protections. The list of veto rights extends for seven pages, and includes 50 discrete prohibitions. These veto rights include any issuance of equity or other recapitalization, entry into any new business, payment of any dividends, and other significant corporate actions.[27]

Significantly, the Shareholders Agreement also provides the Apax Partners funds and the Permira funds with veto power over many of the commercial and operational details of Inmarsat's business. For example, each has an absolute veto over the adoption and implementation of Inmarsat's annual budget, which sets the specific course of the business for each year.[28] And after the Budget is approved, the Apax Partners funds and the Permira funds each may veto any alteration to or deviation from that budget.[29] The Apax Partners funds and the Permira funds each have veto rights over basic operational strategies and policies – Inmarsat's employee benefit plans,[30] its risk management strategy, and its health, safety, and

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[26] Opposition at 14.

[27] Shareholders Agreement at Schedule 6, Items 1 (recapitalization), 3 (dividends), 6 (material changes in nature of business) and 34 (new subsidiaries and investments). Note that these rights may be broader than "typical" investor protections. In the MCI case, for example, the company was restricted from undertaking similar activities, but only to the extent those acts exceeded certain thresholds ranging from 5% to 20% of the company's capitalization. *See In re Request of MCI Communications Corporation British Telecommunications PLC*, 9 FCC Rcd 3,960 ¶ 20 (1994) ("MCI Order").

[28] Shareholders Agreement at § 7.3.2.

[29] *Id.* at Schedule 6, Item 9.

[30] *Id.* at Item 15.

environmental policies.[31] The Shareholders Agreement provides that each may veto any capital expenditure greater than $5 million[32] and any disposal of assets with a value of £ 500,000 or more[33] – tiny thresholds in a company with a total capitalization of over $1.8 billion. Likewise, the Agreement provides that each may veto any political or charitable donation in excess of £5,000[34] and any corporate sponsorship in excess of £50,000 per year,[35] and that each may veto the initiation or subsequent conduct of any litigation in which the amount in controversy exceeds £100,000 – virtually any litigation at all.[36]

Thus, the former signatories have yielded to the Apax Partners funds and the Permira funds an extraordinary range of approval rights, the sum of which enables them effectively to control the conduct of Inmarsat's business. The acquisition of these rights by the Apax Partners funds and the Permira funds was a condition precedent to their takeover of Inmarsat in December 2003.

b. *The Apax Partners and Permira veto rights go well beyond "minority protections"*

MSV's characterization of the negative controls of the Apax Partners funds and the Permira funds as "minority protections" is factually misplaced, as those negative controls entrench the power of the entities holding a majority voting interest, not a minority interest. More importantly, this characterization is legally erroneous. The Commission has often considered the extent of investor protections, and the point at which such protections are so great

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[31] *Id.* at Item 17.

[32] *Id.* at Item 19. By way of comparison, Inmarsat's next-generation satellite system requires capital expenditures in excess of $1.5 Billion.

[33] *Id.* at Item 5.

[34] *Id.* at Item 32.

[35] *Id.* at Item 33.

[36] *Id.* at Item 36. In practice, the Apax Partners funds and the Permira funds have chosen to delegate to management the authority to undertake some of these restricted activities up to slightly higher monetary levels without further approval, but retain their ability to revoke that delegation of authority.

as to confer control of an enterprise. In the *Baker Creek* case, for example, the Commission concluded that under the circumstances, a partner "controlled" the enterprise, even though it did not hold a majority equity stake, and even though it could be outvoted on the partnership's management committee.[37] The partner in *Baker Creek* possessed a number of the "typical" investor protections that do not by themselves constitute control, such as an ability to approve changes in the company's capitalization and financing, and certain major employment decisions.[38] But of decisional significance in *Baker Creek* was the partner's ability, through a series of negative controls over the company's business plan, budget, and general line of business, to control the *actual conduct* of the company's operations. In *Baker Creek*, these powers rose above the level of "typically permissible investment protections," and instead conveyed "the power to dominate [the company's] business affairs by determining its policies and operations."[39]

The same circumstances exist here. Even if the other Inmarsat shareholders had a majority of the votes, or controlled a majority of the board seats – which, unlike in *Baker Creek*, they do not – there is still essentially nothing that they could do without the permission of the Apax Partners funds and the Permira funds. The other Inmarsat shareholders can not make any change to the executive team without the consent of the Apax Partners funds and the Permira funds, they can not dictate or change the Inmarsat business plan, they can not force Inmarsat to distribute money, they cannot make Inmarsat procure or launch a satellite, and they cannot cause Inmarsat to enter into any merger or joint venture. Even without their majority voting rights, and even without their majority representation on the board, the Apax Partners funds and the Permira Funds would retain negative control over Inmarsat just by virtue of the veto rights conferred by

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[37] *See generally* Baker Creek Order.

[38] *Id.* at ¶¶ 16-30.

[39] *Id.* at ¶ 29.

the terms of the Shareholders Agreement. Together, these positive and negative rights give each of the Apax Partners funds and the Permira funds "the power to 'dominate' the management of [Inmarsat's] corporate affairs."[40] The Apax Partners funds and the Permira funds – not any (or all) of the former signatory shareholders – control Inmarsat.

C. The Former Signatories Do Not Control Inmarsat

As set forth above, the Apax Partners funds and the Permira funds hold a majority of the voting equity, they hold appointment and removal power over a majority of the Board of Directors, and they hold a series of specific negative controls over virtually every material aspect (and many immaterial aspects) of Inmarsat's operations. Plainly the Apax Partners funds and the Permira funds control Inmarsat. But ORBIT does not require a finding that the Apax Partners funds or the Permira funds, together or individually, actually control Inmarsat. ORBIT only requires that the former signatories "do not possess" effective control Inmarsat.[41]

1. The former signatories relinquished *de jure* control

There can be no doubt that the former signatories no longer possess *de jure* control over Inmarsat. Immediately prior to the December 2003 takeover by the Apax Partners funds and the Permira funds, former signatories together held 96.36 percent of the voting power in Inmarsat.[42] As of Inmarsat's certification in November 2004, the former signatories held 42.54 percent.[43] Affirmative control has thus passed from the former signatories, as they no longer are able to assemble a majority voting position without the Apax Partners funds or the Permira funds. It is well established that control may be relinquished even where no other party

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[40] Sprint Order at ¶ 20.

[41] ORBIT Act at § 621(5)(F)(i)(II).

[42] This figure includes, for the sake of argument, Comsat's holdings. Excluding Comsat's holdings, the former signatories held 82.40 percent.

[43] Again, this figure includes Comsat's holdings. Excluding Comsat's holdings, the former signatories held 28.58 percent of Inmarsat's voting equity as of the date of its certification.

comes into control.[44] The diminution of the former signatories' collective voting interests from an overwhelming majority to a distinct minority by itself constitutes a transfer of *de jure* control.

2. The former signatories cannot control the Board

For the reasons set forth above, the former signatories have ceded control over the Inmarsat board. The two board seats that Comsat and Telenor are able to fill[45] are a distinct minority to the six (or potentially more) seats over which the Apax Partners funds hold appointment and removal power.

3. The former signatories lack any other indicia of *de facto* control

MSV's allegation that aggregate shareholding of 42.54 percent, scattered among more than a dozen entities might somehow rise to the level of "control" belies credulity. There is no evidence whatsoever of a voting agreement among the signatories, or that the signatories in practice do or would act as a cohesive block. And even if they did act as a block, their votes would fall far short of the level needed to control the company, and in any event the board appointment and veto rights of the Apax Partners funds and the Permira funds would prevent any such control.[46] As detailed above, through the Shareholders Agreement, the former signatories have vested overwhelming negative controls in the Apax Partner funds and the Permira funds, which allows each of the Apax Partners funds and the Permira funds to block virtually any act of

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[44] *See* Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 305 (1991) (discussing relinquishment of control, and concluding that such situations are considered a "transfer of control" under the Commission's precedent).

[45] As Lockheed Martin has made plain, neither it nor its Comsat subsidiary is a signatory or a former signatory.

[46] MSV's citation to the Commission's satellite attribution rules is inapposite, for the rules themselves make plain that the 33 percent threshold for the attribution of ownership is entirely distinct from *separate* requirement that "controlling interests" be attributed. 47 CFR § 25.159(c)(2). Likewise MSV's citation to the definition of control for purposes of a specific restriction in Inmarsat's Articles of Association is inapposite, because that represents a negotiated constraint on Inmarsat's ability to acquire certain types of interests in new businesses. Articles of Association at § 39.9.

any significance to the company. Even if the signatories formed a voting coalition, they could not cause Inmarsat to raise or distribute money, change its line of business, modify or deviate from its business plan – or formulate a new plan – without the consent of both the Apax Partners funds and the Permira funds. Moreover, under the Shareholders Agreement, the former signatories have expressly covenanted specifically not to take, or to allow to be taken, any of the acts that require the Apax Partners funds' or the Permira funds' consent, without that consent.[47]

a. *Minority protections in favor of the former signatories do not allow them to "dominate" Inmarsat*

MSV claims that certain "supermajority" voting provisions in Inmarsat's Articles of Association provide the former signatories with *de facto* control: (i) a restriction on Inmarsat acquiring an entity that owns, control or operates a land earth station, (ii) a restriction on the issuance of new shares, (iii) a restriction on the abrogation of the rights of any share class, (iv) a restriction on amendments to the Articles and the Shareholders Agreement, and (v) a restriction on entry into related-party contracts (*i.e.*, contracts with Apax or Permira).[48] None of these provisions, nor all of them together, even approaches the threshold of *de facto* control.

MSV attempts to make much of the restriction on Inmarsat's acquisition of a land earth station operator (LESO). Yet the LESO acquisition restriction is extremely narrowly drawn: it restricts Inmarsat from effectuating a tiny subset of possible acquisitions – a line of business in which some if its shareholders historically have participated. And in any event the restriction is only temporary, and "sunsets" in December 2006.[49] This restriction comes nowhere near *de facto* control. To the contrary, the Commission has previously recognized that such line-

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[47] Shareholders Agreement at § 8.2.

[48] Opposition at 7.

[49] Article of Association at § 39.9.1.

of-business restrictions, even when far more broadly drawn, are permissible investor protections and do not effect "control."[50]

The corporate governance restrictions cited by MSV likewise fall well short of "control." Restrictions on changes to a company's capitalization are among the most common of all investor protections, and have been repeatedly upheld by the Commission.[51] Likewise, the restrictions on amendments to the Articles or to the Shareholders Agreement, and on the abrogation of rights thereunder, are simply measures that protect the status quo under those documents from revision by the majority.[52] Restrictions on affiliated transaction with an entity that controls a company likewise are common investor protections.

In sum, the minority protections provided to the various former signatories are just that. As the Commission has recognized, "influence and control are not the same."[53] In order to rise to the level of *de facto* control, "influence must be to the degree that a minority shareholder is able to 'determine' [the entity's] policies and operation, or 'dominate' corporate affairs."[54] Whether viewed in isolation, or together with the other facts and circumstances (including control over the composition of the board, and the separate enumerated rights afforded the Apax Partners funds and the Permira funds), the minority protections retained by the former signatories do not even approach the ability to "determine" or "dominate" corporate affairs.

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[50] *See, e.g.*, News International Order at 357 ¶ 20 (1984) ("prohibition against engaging in broadcasting or cellular radio operations" is "in essence a covenant not to compete" with shareholders who engage in such operations, and as such is "reasonable" and "grants neither party control").

[51] *See, e.g.*, Baker Creek Order at ¶ 9; MCI Order at ¶ 13.

[52] *See, e.g.*, MCI Order at ¶ 15.

[53] News International Order ¶ 16.

[54] *Id.*

b. *Distribution agreements do not confer "control"*

Finally, MSV claims that the former signatories somehow exercise *de facto* control over Inmarsat because collectively they account for much of Inmarsat's global sales.[55] Again, MSV is mistaken.[56] There is simply no support for the proposition that a distribution agreement confers control by the distributor over the carrier. Indeed, the opposite is true. In the broadcast context, for example, the Commission has recognized that a licensee may retain "control" over a radio station even where the licensee leases essentially the entire output of that station to another entity, sells all of the equipment needed to operate the station, and also enters into an agreement to sell the remaining assets to that same entity.[57] Likewise, in its wireless spectrum leasing rules the Commission recognizes that a licensee may retain "control" even when it leases all of its licensed spectrum to another entity, does not own the equipment needed to operate the licensed facility, and it has virtually no involvement with policy or operations.[58] MSV provides no support for the notion that a group of distributors somehow, by virtue of their distribution arrangements, "control" or "dominate" the producer of the product they distribute.

The practical implications of MSV's claim further reveals its flaws. By taking aim at Inmarsat's distribution arrangements, MSV necessarily calls into question the basic arrangement by which Inmarsat does business, and by which Inmarsat conducted business before ORBIT was enacted. When Congress wanted structural separation between former signatories

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[55] MSV Opposition at 10-11.

[56] Notably, MSV again misstates the facts when it announces that "Telenor, KDDI and Stratos . . . [a]ll . . . hold significant voting interests in Inmarsat." MSV Opposition at 10. In fact, Stratos holds exactly *one share* of Inmarsat stock, accounting for 0.0000037% of Inmarsat's voting interests. *See* Petition at Attachment B.

[57] *See, e.g., Assignment of Licenses of KHGI(TV), KWNB(TV), File Nos. BALCT-960723KJ and KL, KSNB(TV), K17CI, K22CX, K18CD, File Nos. BALCT-970128IA, BALTT-970128IB-ID*, Letter Ruling, MD-1800E1 (Feb. 17, 1999), *aff'd* 19 FCC Rcd 8229 (2004).

[58] *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order, 18 FCC Rcd 20,604 ¶¶ 100-105 (2003).

and Inmarsat, it spoke, specifically mandating certain types of structural separation.[59] But nothing in the ORBIT Act evidences Congressional intent to require Inmarsat to alter its existing distribution arrangements with the former signatories.

Commission precedent allows "minority shareholders 'to wield significant influence, including the ability to affect the outcome of votes or the day-to-day operations of a company, so long as that influence does not rise to a consistent level of dominance at which the minority shareholder is determining how the company runs and what business choices it makes.'"[60] The influence of the former signatories over Inmarsat is not even truly "significant," let alone "a consistent level of dominance." By any measure, the former signatories do not possess "control" of Inmarsat.

IV. MSV'S OTHER ACCUSATIONS ARE BASELESS

MSV continues making allegations that are unfounded and incorrect, that were previously dismissed by the Commission, and which therefore border on an abuse of process.[61] MSV once again wrongly claims that Inmarsat was "established as a legal monopoly" among PTTs and that Inmarsat has developed a "dominant position" in the provision of MSS as a result of this "heritage."[62]

Inmarsat was not established as a "legal monopoly." No member was obliged to give Inmarsat the exclusive right to provide service in its jurisdiction. Inmarsat was created as

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[59] ORBIT Act at §§ 621(2), 621(5)(C), and 621(5)(D).

[60] *In re Application of GTE Corporation,* Memorandum Opinion and Order, 15 FCC Rcd 14,032, 14,077 (¶ 80) (2000) (quoting *In the Matter of Lockheed Martin Corporation Regulus, LLC and Comsat Corporation*, 14 FCC Rcd 15,816 ¶ 31 (1999)).

[61] *See Commission Taking Tough Measures Against Frivolous Pleadings*, Public Notice, 11 FCC Rcd 3,030 (Feb. 9, 1996) ("frivolous complaint is one 'filed without any effort to ascertain or review the underlying facts' or 'based on arguments that have been specifically rejected by the Commission'" citing *Implementation of Cable Television Consumer Protection Act,* 9 FCC Rcd. 2,642 (1993)).

[62] *MSV Opposition* at 1, 3; *see also supra* note 5 (listing other of MSV's material misstatements of fact).

an intergovernmental organization to improve maritime distress and safety communications, because the associated risks were so high that no private company was willing to undertake them at the time. The Inmarsat Convention never was used by Inmarsat to block new entrants: decisions about market access were left to regulators in each national market, and MSV's own satellite system was successfully coordinated under Article VIII of that convention. Inmarsat even provided MSV's predecessor, AMSC, a "jump start" on its MSS business by leasing it capacity on Inmarsat spacecraft.

More fundamentally, the Commission has soundly rejected MSV's suggestions that Inmarsat's provision of services in the U.S. and its "heritage" have an anticompetitive effect or placed MSV at a competitive disadvantage. MSV made these types of allegation when Inmarsat distributors sought U.S. market access,[63] and again in 2003 and 2004 in connection with the Commission's annual report to Congress regarding the ORBIT Act.[64] In the *Market Access Order*, the Commission found that granting Inmarsat access to the U.S. market "serve[s] the public interest by increasing competition and providing additional services for U.S. consumers."[65] Less than year after granting Inmarsat market access, the Commission reported to Congress that:

> Inmarsat's privatization has also had a positive impact on the domestic U.S. market. Privatization has provided Inmarsat the opportunity to develop new, innovative services for the U.S. market that promises to result in the expansion of options and resources for U.S. customers. This also promises to lead to increased industry competition.[66]

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[63] *See* Market Access Order at ¶ 32 (discussing MSV's urgings that the Commission to take into account alleged "past anti-competitive conduct by Inmarsat").

[64] *See* Comments of Mobile Satellite Ventures Subsidiary LLC, In the Matter of Report to Congress Regarding the ORBIT Act, SPB-183, at 2 (filed April 17, 2003); Comments of Mobile Satellite Ventures Subsidiary LLC, In the Matter of Report to Congress Regarding the ORBIT Act, IB Docket No. 04-158, at 16 (filed May 7, 2004).

[65] Market Access Order at ¶ 1.

[66] FCC Report to Congress as Required by the ORBIT Act, FCC 02-170 at 12 (June 14, 2002).

And just six months after the Apax and Permira funds-orchestrated takeover of Inmarsat, the Commission once again found that Inmarsat's privatization has a positive effect on the MSS market.[67]

MSV takes language from Inmarsat's securities disclosure documents out of context in an attempt to give its old claims a new look.[68] Inmarsat's securities disclosures do say that Inmarsat is a leading provider of global mobile satellite communications services. But it also is true that many MSS competitors have developed and successfully compete with Inmarsat around the world.[69]

In the U.S., MSV is Inmarsat's primary competitor. MSV and its predecessors, AMSC and Motient fought against the opening of the U.S. market for years, and MSV continues to do so to this day. Prior to 2000, Motient had a *regulatory monopoly* in the provision of L-Band land mobile services in the U.S. After TMI gained access to the U.S. market, Motient entered into a joint venture to form MSV and thereby regained *de facto* monopoly status in the U.S. To this day, MSV retains monopoly protection from potential *U.S. competitors*, because the Commission will not license another U.S. MSS operator in the L-band unless the U.S. coordinates more than 20 MHz of spectrum under the Mexico City MOU.[70] It was only in October 2001 that Inmarsat was able to gain full market access to the U.S. – access that MSV seeks to constrain by its objections

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[67] FCC Report to Congress as Required by the ORBIT Act, FCC 04-132 at 15 (June 15, 2004).

[68] Opposition at 3 n. 9.

[69] In fact, Inmarsat faces substantial competition from global MSS operators (Iridium and Globalstar are able to aggressively price voice and low speed data services because they do not have to cover debt service after going through Chapter 11 bankruptcy), regional MSS operators (MSV in North America; Thuraya in the Middle East, Europe, Northern Africa, and the Indian Subcontinent; and ACeS in Central and Southeast Asia; Optus in Australia; INSAT 3C in India; N-Star in Japan), and VSAT services (a Fixed Satellite Service that uses very small aperture terminals that can be transported and set up at remote locations to provide broadband data services).

[70] *In the Matter of Establishing Rules and Policies for the use of Spectrum for Mobile Satellite Services in the Upper and Lower L-band*, Report and Order, 17 FCC Rcd 2,704, ¶ 19 (2002).

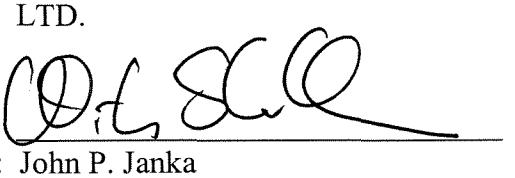
here. The Commission should not countenance those efforts to limit competitive choices for US consumers of MSS.

IV. CONCLUSION

Inmarsat has complied with both the letter and the spirit of ORBIT. It has divested a clear majority of its voting securities to non-signatories. Those entities are able to dominate the Board of Directors by appointing (or removing) a majority of the directors at will, and they have specific control (through their respective veto rights) over virtually every material corporate act – and many acts that are not material. The former signatories do not possess effective control over Inmarsat. The Commission can and should find, on the basis of the existing record, that Inmarsat has satisfied the remaining requirements of the ORBIT Act.

Respectfully submitted,

INMARSAT GROUP HOLDINGS LTD.



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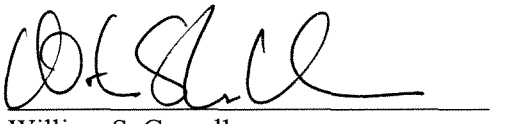

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